No. 83-458

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

COMMUNITY NUTRITION INSTITUTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. As we pointed out in our petition (at 14-16), the decision below is in direct conflict with *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972). Respondents do not deny that the conflict exists; instead, they argue that *Rasmussen* is no longer good law and speculate that the Ninth Circuit might not follow *Rasmussen* today (Br. in Opp. 10-11). Respondents are wrong about the continuing vitality of *Rasmussen*, and their speculation about how the Ninth Circuit would decide the case today is entirely unfounded.

a. Respondents' contention (Br. in Opp. 10-11) that *Rasmussen* has not been followed by other courts is specious. Indeed, until respondents filed suit in the instant case, *Rasmussen* had so clearly established the law on the subject of congressional intent to preclude consumer challenges to

milk market orders that no other consumer suits have been brought. Thus, no other courts have had occasion even to consider departing from *Rasmussen*. What is more, if the decision below is allowed to stand, no other courts ever will have the opportunity to address the issue presented by this case because the District of Columbia Circuit has now established itself as a nationwide forum for all consumer suits that heretofore have been barred on the authority of *Rasmussen*. Thus, resolution of this conflict is important.

b. Respondents argue (Br. in Opp. 11) that the Ninth Circuit today would apply a stricter test for determining whether Congress intended to preclude review. But the cases they rely upon for that assertion present fundamentally different circumstances. In both cases,* the plaintiffs sued to protect their own direct interests, which were not derivative of the interests of any other party directly regulated or affected by the statutes in question. Here, by way of contrast, the AMAA establishes a cooperative program involving the Secretary of Agriculture, producers, and handlers. As Judge Scalia noted below in dissent, "the whole premise" of liberalized notions of judicial review has no applicability when there is a "direct and immediate beneficiary class which can be relied upon to challenge agency disregard of the law" (Pet. App. 38a). In such circumstances, there is no justification and no necessity for concluding that Congress intended courts to grant judicial review at the behest of a class as remote and generalized as all milk consumers in the country.

c. Respondents also contend (Br. in Opp. 13) that handlers will not use the decision below to avoid the statutorily-mandated administrative exhaustion requirements because, according to respondents, it is actually in

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Kitchens v. *Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 535 F.2d 1197 (9th Cir. 1976); *County of Alameda* v. *Weinberger*, 520 F.2d 344 (9th Cir. 1975).

the interests of handlers to pursue administrative remedies prior to bringing suit. If this were really so, one must ask why respondent Oberweis (the handler in this case) failed to exhaust his administrative remedies (see Pet. App. 31a-33a) prior to aligning himself in court with consumers whose complaint the court of appeals has ordered to be heard without regard to the statutory exhaustion requirements.

More fundamentally, respondents have misstated the statutory scheme. Citing 7 U.S.C. 608c(14), respondents contend (Br. in Opp. 13) that by initiating the administrative review process prior to bringing suit a handler "may simple [*sic*] continue his current practices until and unless the Secretary affirms the challenged regulation." In fact, 7 U.S.C. 608c(14) merely protects a handler against the imposition of *monetary* penalties during the pendency of the Secretary's consideration of a handler's petition for review. During that time, however, a handler is *not* free to "continue his current practices" because the United States is authorized to seek injunctive relief against the violation of any order, regulation, or agreement issued under the Act without regard to the pendency of administrative proceedings. See 7 U.S.C. 608a(6). Moreover, a court reviewing the Secretary's disposition of a handler's petition for review may not interfere with the government's right to seek injunctive relief under 7 U.S.C. 608a(6). See 7 U.S.C. 608c(15)(B). This unusual limitation on the scope of judicial authority clearly demonstrates the importance Congress attached to the administrative process created by the statute and its intention not to permit interference with that scheme. Thus, the danger of handlers aligning themselves with consumers in order to circumvent Congress's intent is real.

2. Respondents misstate our position with respect to the court of appeals' decision on standing. Respondents contend (Br. in Opp. 15, 20) that we challenge the court of

appeals' failure to decide "ultimate issues [on the] merit[s]." Our complaint is precisely the opposite. Our quarrel with the court of appeals is that it has allowed respondents to proceed to a trial on the merits without first requiring them to prove that they satisfy the constitutional and prudential limitations of the standing doctrine.

Respondents' position seems to be that bare allegations of speculative injury and redressability are sufficient to entitle them to a trial on the merits. The court of appeals agreed with respondents, holding that at this stage of the litigation respondents should be given the benefit of the doubt and allowed the opportunity to prove their standing allegations at trial (Pet. App. 18a-19a). But it is firmly established that controverted allegations of standing must be supported *before* trial. See, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 501-502 (1975). Strict adherence to that requirement is particularly necessary in this case because the trial on the merits that the court of appeals has ordered will likely be devoted to issues wholly unrelated to respondents' standing. Indeed, the court itself recognized that the questions to be resolved on the merits are narrow in scope (Pet. App. 34a n.95; emphasis in original): "The compensatory payment regulation should be sustained if it is within the Secretary's granted power, issued pursuant to proper procedure, and supported by adequate evidence and reason *when adopted.*" Thus, the trial court would have no authority to order the Secretary to adopt different regulations merely because such regulations might make more reconstituted milk available for purchase by consumers or might lower its price. Under these circumstances, the trial on the merits is not likely to produce any evidence supportive of respondents' standing allegations. Respondents should not be allowed to proceed until and unless these defects have been corrected.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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